

OPTIMISATION OF PHILANTHROPIC WAQF: THE NEED FOR MAQASID-BASED LEGISLATIVE STRATEGIES

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Abstract

Waqf institutions were most central in financing socio-religious and public welfare systems during the early days of Islam. More importantly, the contribution of philanthropic endowment (waqf khayri) substantially financed and sustained social welfare institutions in Muslim societies. Gradually however, the creation of this type of waqf dwindled and degenerated. Today, by and large, waqf institutions consist of the religious kind particularly in Malaysia. To remedy this situation, we believe that we do not only need to rethink the regulatory cum institutional structures of waqf but we also have to seriously earmark jurisprudential strategies for the revival of waqf khayri in this direction.

INTRODUCTION

During the glorious days of Islam, *waqf* (Islamic endowment) played a considerable part in the socio-educational, cultural and life-saving aspects of Muslims. Early Muslims gifted with divine bounties were sensitive towards the plight of their downtrodden brothers and sisters in their community. They dedicated numerous properties to uplift the lots of the unfortunate among them aside from parting with their wealth for other religious institutions, such as mosques, burial grounds and religious seminaries. However today, *waqf*, by and large, is understood as a dedication made for purely religious causes. To us, this narrow understanding of philanthropic endowment is symptomatic of the larger ritualisation of Islam and its institutions as a whole. To remedy the situation, we propose that, among others, it is of paramount importance to move beyond the literal understanding of the *waqf* jurisprudence. To do this, first we offer a brief overview of the concept, followed by a sketch of its application in the early days and lastly by looking at the issue from a *maqasid* perspective with the idea of proposing some legislative strategies for providing the optimisation for impetus towards *waqf khayri*.

CONCEPTUAL FRAMEWORK

Literally, *waqf* means to stop, hold, restrain, detain or prevent; such as by saying, 'preventing from disposition.'¹ In Islamic law, *waqf* signifies irrevocable dedication of a portion of one's wealth for the purpose of expending its usufructs to legitimate causes or *charitable and righteous ends with the overriding objective of getting closer to God.*²

Waqf, ipso facto, derives its validity from the general directives of the Quran exhorting Muslims to be benevolent and charitable towards social causes. For instance, the Quran provides:

What you can spare of your wealth as should benefit the parents, the relatives, the orphans, the needy, the wayfarers for Allah is not unaware of the good deeds that you do.³

Again it states:

By no means shall you attain righteousness unless you give of that which you love; and whatever you give, of a truth God knows it well.⁴

Another verse reiterates:

O you who believe! Give of the good things which you have lawfully earned ...⁵

The specific legislative foundation of *waqf*, a fortiori owes its origin in the Sunnah of the Prophet. He as the proclaimer of divine legislation who imbibed Muslims in various ways to care for benevolent causes by dedicating some portion of their wealth. For instance, he declared that the most enduring way of earning a reward from God for eternity is by way of dedicating one's wealth as an endurable/recurrent charity: 'When a person dies, all his good deeds ceases except three: the establishment of recurrent charity, the writing of a book and the pious children who will pray for him/

1 Muhammad ibn Mukrim ibn Manzur, *Lisan al-Arab*, Vol 9, Dar Sadir, Beirut, nd at p 362.

2 Wahbah al-Zuhayli, *al-Wasaya wa al-waqf fi al-fiqh al-Islami*, Dar al-Fikr, Beirut, 1996 at pp 134-135, cf Siti Mashitoh Mahamood, *Waqf in Malaysia: Legal and Administrative Perspectives*, Kuala Lumpur, University of Malaya Press, 2006 at p 1. For the specific definition by various schools of Islamic jurisprudence, see Muhammad ibn Abi Suhayl, al-Sarakhsi, *al-Mabsut*, Vol 12, Dar al-Ma'rifah, Beirut, 1971 at p 27; Ibrahim ibn Ali al-Shirazi, *al-Muhadhdhab*, Vol 1, Dar al-Fikr, Beirut, nd at p 440; Mansur ibn Yunus, al-Bahuti, *Kashshaf al-Qina'*, Vol 4, Dar al-Fikr, Beirut, nd at p 240; Muhammad ibn Muhammad, al-Hattab, *Mawahib al-Jalil*, Vol 7, Dar al-Kutub al-Ilmiyyah, Beirut, 1995 at p 626.

3 Surah *al-Baqarah* (2):215.

4 Surah *Ali-Imran* (3):92.

5 Surah *al-Baqarah* (2):267.

- A her.⁶ Leading by example, he started building social infrastructure on the basis of *waqf*. For instance, he erected the first mosque (Masjid al-Quba') in Madinah, on a parcel of land made *waqf* by two orphans. These two pioneers in making Islamic *waqf*, in spite of the Prophet's insistence on paying them for their land, refused it and stated that they would claim its reward from God in the next world.⁷ This mosque stands now on the same lot with a new and enlarged structure.⁸
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Impelled by the legislative provisions of the Quran and Prophetic traditions as stated above, the companions of the Prophet uphold his tradition which has been followed until our time by some devout Muslims. For instance, Ibn Umar reported: 'Umar acquired land in Khaybar. He came to the Prophet, seeking advice about it. He said: O Allah's Messenger, I have acquired a piece of land in Khaybar which is the best of all the properties I ever got. What is your opinion about putting it to use in the name of Allah. Thereupon the Prophet said: If you like, you may keep the corpus intact and give its produce as sadaqah (charity).' So Umar agreed to give it as a charity, and declaring that the property in question must neither be sold nor inherited and not given away as a gift. Umar, indeed devoted the land in question to the poor, to the nearest of kin, to the emancipation of slaves, to wayfarers/guests, and in the way of God.⁹

Abu Talhah, another companion of the Prophet, also after the revelation of Surah *Ali-Imran* (3):92, went to the Prophet and said:

- E O God's Messenger, in line with God's command, that I will not attain piety until I (you) spend of what you love, and the most beloved property to me is Bayruha — a garden where the Prophet used to go and sit in its shade and drink from its water. I give it to God and His Messenger, hoping for God's reward in the Hereafter. So, O God's Messenger use it as God orders you to use it. The Prophet said: Bravo! O Abu Talhah, it is a fruitful property. We have accepted it from you and now we return it to you. Distribute it amongst your relatives.¹⁰
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Another companion of the Prophet in the name of Mukhayriq made his will that his seven orchards in Madinah be given after his death to Muhammad. When he died, the Prophet took hold of the orchards and made them a charitable *waqf* for the benefit of the poor and needy.¹¹

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6 Muhammad ibn 'Isa al-Tirmidhi, *Sunan al-Timidhi*, Vol 3, al-Maktab al-Islami, Beirut, 1988 at p 660.

7 Sulayman ibn Ash'ath Abu Dawud, *Sunan Abu Dawud*, Vol 3, Dar al-Fikr, Beirut, nd at p 78.

8 *Waqf-Beginning*, 24 November 2008 at www.allahswaqf.com.

9 Abd al-Rahman ibn Shu'ayb al-Nasa'i, *Sunan al-Nasa'i*, Vol 6, Mustafa al-Babi al-Halabi, Egypt, 1964 at p 230.

I 10 Muhammad ibn Ali, al-Shawkani, *Nayl al-Awtar*, Vol 2, Dar al-Jalil, Beirut, 1973 at p 136.

11 Abu Dawud, *Sunan Abu Dawud*, Vol 3 at p 79.

According to Jabir, some who dedicated their fruit orchards as endowment made it a condition that the fruits and revenues of their *waqf* be first given to their own children and descendants and only the surplus, if any, should be given to the poor.¹²

In the light of the above, Muslim jurists detailed the minutest juridical rules of *waqf* including the following.

Legal value

The majority of jurists regard *waqf* as a recommended benevolent act (*tabarru' mundub*) as its *raison de'tre* lies on contributing to righteous philanthropic causes (*jihat al-birr wujuh al-khayr*) which is recommended by textual sources, namely, the Quran and the Sunnah. The Hanafiyyah, however disagreed by saying that *waqf* in terms of legal value is merely a permissible venture (*mubah*) mainly because it can also be made by non-Muslims.¹³ The majority's view, we believe, is more authoritative as the Prophet encouraged its institution by his companions as well as approved those which were made by them, thus falling within the purview of the Sunnah in the hierarchy of Islamic legal taxonomy.

Types

Most of the jurists and text writers divide *waqf* into philanthropic (*khayri*) and family (*ahli* or *dhurri*) kinds of endowment. The former refers to, 'a dedication in perpetuity of the capital and income of an asset, recognised by Islamic law, for philanthropic causes even if it subsequently is dedicated to specific people'. For instance, dedicating one's parcel of land initially for a certain school or hospital and later on reverting it to one's own progeny is an example of this kind.¹⁴ The family *waqf*, on the other hand, signifies dedicating one's asset as approved by Shariah in favour of one's self and one's children and subsequently dedicating it to philanthropic causes.¹⁵ Nevertheless, contemporary legal scholars like Zain have taken more pragmatic view by classifying *waqf* into three types: first, is family *waqf* whose sole beneficiaries would be one's near relatives and family. Second, is the welfare (philanthropic) *waqf* whose beneficiaries are members of the public or institutions, such as destitute, orphans, hospitals, schools, mosques, cemeteries and others which is regarded as the most pious act by jurists and the most popular form made by people in Malaysia. Third is *waqf*

¹² *Ibid.*

¹³ Al-Zuhayli, *al-Wasaya wa al-Waqf fi al-Fiqh al-Islami* at pp 136–137. See also Muhammad 'id al-Kubaysi, *Ahkam al-Waqf fi al-Shari'ah al-Islamiyyah*, Vol 1, Mataba'at Irshad, Baghdad, 1997 at p 141; Mundhir Qahf, *al-Waqf al-Islami: Tatawwuruhi, Idaratuhu, Tanmiyatuhu*, Dar al-Fikr, Damascus, 1993 at p 31.

¹⁴ Al-Zuhayli, *al-Wasaya wa al-Waqf fi al-Fiqh al-Islami* at p 140, cf Muhammad Abd al-Rahim, *Ahkam al-Waqf 'ala al-Dhuryah*, Vol 1, Matabi' al-Safa', Mecca, 1996 at p 232.

¹⁵ Al-Zuhayli, *ibid.*

- A** *mushtarak* (a concomitance of welfare and family *waqf*) signifying dedication of one's property partly for the welfare of the public and partly for the benefit of one's family.¹⁶ We believe that this is a more accepted view as it clearly demarcates the line of distinction between the beneficiaries and thwart the possibility of lawsuits arising from competing claims over *waqf* properties upon the founder's death.
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Legal stipulations

- C** Subject to the stipulations as specified by various schools,¹⁷ the agreed conditions of validity for *waqf* are: firstly, the maker of *waqf* should be an adult person of sound mind and unrestrained in his power to dispose his property. Secondly, the property in question (*mawquf*) must be declared as *waqf* with clear intentions by the creator (*waqif*). Thirdly, the beneficiary (*mawquf 'alayhi*) does not have to be a Muslim. *Waqf* for the welfare of a non-Muslim is valid provided that he/she is not a hostile member of the combatant camp against Muslims for example Safiyah, the wife of the Prophet, made *waqf* in favor of her Jewish brother.¹⁸ Fourthly, the property of *waqf* has to be approved by Shariah. Fifthly, the objective for which *waqf* is created must not be against Islam. Finally, the founder must not dedicate more than one third of his/her property as *waqf* except with the explicit consent of his/her legal heirs.¹⁹
- D**

- E** *Subject of the waqf (mawquf bihi)*

- F** Jurists are unanimous on the dedication of immovable properties as *waqf*. The reason is twofold: firstly, that all the incidents of *waqf* approved by the Prophet pertained to such assets; and secondly, permanent utility of such assets as the fitting subject of *waqf*. Nevertheless, they were divided on the dedication of movable properties as *waqf*. The majority approved it and the Hanafiyyah predominantly did not. The reason is that to the Hanafiyyah, movable properties could not be utilised in perpetuity which is the basic

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- H** 16 Quoted in Abdul Fatah bin Haji Kahlid, *Islamic Law and Land in the State of Selangor, Malaysia: Problems of Administration and Islamisation*, a doctoral thesis submitted to the University of Edinburgh, 1988 at pp 240–243. See also Siti Mashitoh Mahamood, *Waqf in Malaysia: Legal and Administrative Perspectives* at p 17.

- I** 17 For details, see Ala' al-Din ibn Mas'ud, al-Kasani, *Bada'i' al-Sana'i' fi Tartib al-Shara'i'*, Vol 7, Mataba'at al-Imah, Cairo, nd at p 17; al-Bahuti, *Kashshaf al-Qina'*, Vol 6 at p 452; Muhammad al-Khatib, al-Shirbini, *Mughni al-Muhtaj*, Vol 2, Dar al-Fikr, Beirut, nd at p 360; Muhammad 'Arafah ibn 'Abd al-Baqi, al-Dasuqi, *Hashiyat al-Dasuqi*, Vol 4, Dar al-Fikr, Beirut, nd at p 75.

- 18 Al-Zuhayli, *al-Wasaya wa al-Waqf fi al-Fiqh al-Islami* at p 167.

- I** 19 For details, see *ibid* at pp 153–183; Abdul Fatah bin Hj Kahlid, *Islamic Law and Land in the State of Selangor, Malaysia: Problems of Administration and Islamisation* at pp 234–238.

characteristic feature of *waqf*.²⁰ However, from a legal proposition put forth by Ibn 'Abidin, one may gauge the real reason for such avowal of the part of the Hanafi school. He says: 'Dedicating of *darahim* (silver coins) as *waqf* was customary among the Romans and the dedication of hatchet and ads were common among ancient people. But they are no more customary in our time, hence can no more be valid in our time.'²¹ This dicta is important as it unveils the very underlying reason for the divergent position of the Hanafiyyah on the issue. If that be the case, we believe that this would lead us to the conclusion, that the law based on customary considerations is changeable on the account of changes in time and space. Accordingly, cash *waqf* in our time has emerged as the most viable means by which Muslims can make *waqf* on a broader base particularly via modern mechanisms, such as *takaful waqf* plan as practiced in Malaysia.²²

Exchangeability (istibdal al-waqf)

There is no disagreement that all *waqf* if cease to serve their objectives, could be exchanged with other similar properties and dedicated for the same purposes. However, jurists disagreed on the issue of abandoned mosques; the majority disallows it but the Hanabilah approved the sale of its land and the purchasing of another one instead. The reason for this divergent position of the Hanabilah is one of purposive interpretations of the law. To them, once the mosque does not serve its stated purpose, keeping it in perpetuity would prove futile.²³

Salient features

They are two salient features. First, is the perpetuity of its dedication. The implication is that once a property, often a real estate, is dedicated as *waqf*,

20 Abd Allah ibn Muhammad, Ibn Qudamah, *al-Mughni*, Vol 5, Maktabah al-Riyad al-Hadithah, Riyad, nd at p 585; al-Shirazi, *al-Muhadhdhab*, Vol 1 at p 440; Muhammad Amin Ibn 'Abidin, *al-Radd al-Mukhtar 'ala al-Durr al-Mukhtar*, Vol 3, Makatabat al-Rashidiyyah, Kuwait, 1963 at p 408.

21 Ibn 'Abidin, *ibid* at p 410. It is to be noted that cash *waqf* was explicitly recognised by the Malikiyyah and ratified by other renowned jurists belonging to other schools such as Ibn Hajar. See Ahmad al-Dardir, *Sharh al-Kabir*, Vol 4, Dar al-Fikr, Beirut, nd at p 87; Ahmad ibn Ali, Ibn Hajar, *Fath al-Bari*, Vol 5, Ihya' al-Turath al-Arabi, Beirut, 1985 at p 475.

22 See Ashraf bin Md Hashim, *The Collection of Waqf through Insurance Companies: A Critical Analysis of the Malaysian Experience*, a paper presented in the International Conference on Co-operative Insurance in the Framework of *Waqf*, International Islamic University Malaysia, 4-6 March 2008 at pp 6, 7.

23 They also claim *ijma'* of companions on the issue when Umar ordered Baitu al-Mal in Kufah to be housed in the Tamarin Mosque which was not objected to by the former. Hence, if that be the case, such an exchange would be valid provided that the future use of the sold mosque structure must be for other activities approved by the Shariah. See Ibn Qudamah, *al-Mughni*, Vol 5 at pp 575-579.

- A it remains *waqf* forever. Subject to divergence of views among the jurists,²⁴ such a *waqf* property requires a lengthy process to be exchanged (*istibdal*) for another property of equivalent value with the approval of the local authority. It follows that such an exchanged asset must immediately become *waqf* for the same purpose and beneficiaries of the original. Second, is the inviolability of the founder's stipulation. Accordingly, as a matter of principle, the revenues of *waqf* should exclusively be used for the objective stipulated by its founder; thus the managing authority has no any jurisdiction to sway away from these objectives so long as they are compatible with Shariah. However, this will be waived if such purposes become infeasible, in which case, the revenue of this *waqf* should be spent on the closest purposes available in the absence of which, it should be spent in favour of the poor and the needy.²⁵
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FINANCING SIGNIFICANCE IN RETROSPECT

- D The institution of *waqf* which according to Imam Shafie was an unprecedented system of socio-economic support introduced by the Prophet,²⁶ has played a pivotal role in financing religious, educational and healthcare institutions of the Muslim community in the annals of the Islamic civilisation. For instance, information extracted from the registers of *awqaf* in Istanbul, Jerusalem, Cairo and other cities indicate that the lands of *awqaf* covered a considerable proportion of total cultivated area. For instance, in the years 1812 and 1813, a survey of land in Egypt showed that *waqf* represents 600,000 *feddan* out of a total of 2.5 million *feddan*.²⁷
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In Algeria, the number of deeds of *awqaf* of the grand mosque in the capital Algier was 543 in the year 1841. In Turkey, about one third of their

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- 24 This is the opinion of the majority including the two disciples of Abu Hanifah. Abu Hanifah however, differed with them on a technical ground by holding that *waqf* is a kind of revocable charitable undertaking where the owner can retract from it during his lifetime. See al-Shirazi, *al-Muhadhdhab*, Vol 1 at p 442; al-Bahuti, *Kashshaf al-Qina'*, Vol 4 at p 278; al-Dardir, *Sharh al-Kabir*, Vol 4 at p 101; Muhammad ibn Abd al-Wahid, Ibn al-Humam, *Fath al-Qadir*, Vol 5, Dar al-Fikr, Beirut, nd at p 45.
- 25 That is why the jurists declared the legally valid conditions of the founder as mandatory except as justified by a court order or necessity. For instance, if the founder made it a condition that the manager (*mutawwalli/nazir*) cannot be removed but the judge finds such as person unfit for the job; in such an instance, he can be removed. Or if the founder stipulates that the endowment property cannot be rented for more than one year but this would make it unattractive for the tenants, which cannot be respected on this account. For details, see Ibn Qudamah, *al-Mughni*, Vol 5 at p 552.
- 26 Imam al-Shafie in asserting so held: 'As far as I know, the pagan Arabs never endowed a house or a piece of land before the advent of Islam.' Quoted by al-Zuhayli in *al-Wasayah wa al-Waqf* at p 136.
- 27 *Waqf-Facts*, 14 November 2008, www.allahswaqf.com. These historical datas with modification have been adopted from the web.

land was *awqaf*; and finally in Palestine, the number of *waqf* deeds recorded up to the middle of the 16th century was 233 containing 890 properties in comparison with 92 deeds of private ownership containing 108 properties.²⁸

From the financing perspective, religious establishments were solely funded from the revenues of the *waqf* properties. Financing projects usually included salaries of imam, teacher(s) of Islamic studies, preacher(s) and others. With the help of this independent source of financing, religious leaders and teachers were always able to take social and political positions independent of the ruling class. For example, upon the occupation of Algeria by French troops in 1831, the colonial authority took control of the *awqaf* property in order to suppress religious leaders who fought against its occupation.²⁹

Aside from religious education, education in general was the second largest user of *waqf* revenues. Since the beginning of Islam, in the early 17th century, education has been financed by *waqf* and voluntary contributions. Even government financing of education used to take the form of constructing a school and assigning certain properties as *waqf* for the schools. *Awqaf* of the Ayubites (1171–1249) and the Mamalik (1249–1517) in Palestine and Egypt are good examples of such kind. According to historical sources, Jerusalem had 64 schools at the beginning of the 20th century all of which were *waqf* and supported by *awqaf* properties in Palestine, Turkey and Syria. Of these schools, 40 were made *awqaf* by Ayubites and Mamalik rulers and governors. The University of al Azhar is another example. It was founded in Cairo in 972 and financed by its *waqf* revenues until the government of Muhammad Ali in Egypt took control over the *awqaf* in 1812.³⁰

Waqf financing of education usually covered libraries, books, salaries of teachers and other staff and stipends to students. Financing was not restricted to religious studies especially during the hey days of Islam. Aside from guaranteeing freedom of education, *waqf* financing helped to create a learned class not derived from the rich and ruling classes.³¹

The third big beneficiary of *waqf* included the poor, needy, orphans, persons in prisons and others. Other users of *waqf* revenues included health services which covered the construction of hospitals and expenditure on physicians, apprentices and patients. One example of the healthcare centre funded by *waqf* was the Shishli Children Hospital in Istanbul which was founded in 1898.³²

Waqf was also a source of finance which helped people to go to Makkah for pilgrimage and which helped girls get married. Moreover, even animals

28 *Ibid.*

29 *Ibid.*

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

- A were beneficiaries of Islamic endowment as was the case in providing for cats and unwanted riding animals in Damascus.³³

Nevertheless, with the advent of colonisation of Muslim states, the financing significance of *waqf* was curtailed.³⁴ With the state control of *waqf* properties and the introduction of land reforms in Muslim countries subsequent to that, people started to dedicate their properties solely for religious purposes, such as mosques and cemeteries.³⁵ To revive the lost practice of *waqf*, among others, we need to reinstate the role of *waqaf khayri* which in broad terms not only covers making *waqf* for religious ends but also other public welfare aspects such as education, healthcare, charity establishments, research activities and others. To achieve this, among others, we believe that a *maqasid*-oriented approach to the conceptualisation and construction of *waqf* jurisprudence is crucial.

THE PURPOSE OF THE SHARIAH (*MAQASID AL-SHARIAH*)

- D Every law is oriented towards certain purposes. The Shariah, being a divinely inspired code for human conduct, also has its own aims and objectives. Its primary goal is to free a man from the grips of his own whims and fancies so that he may become a true servant of God. As we read in the Quran: 'Then we put thee in the right way of religion: so follow thou that way and follow not the desires of those who know not.'³⁶

E To enable men to serve Him, God has designed His laws to secure men's interest and safeguard their well being (*maslahah*) both in this world and the hereafter³⁷— a thesis which was developed by great thinkers like Imam al-Juwayni, Imam al-Ghazali, al-'izz ibn 'Abd al-Salam, al-Shatibi, Tahir Ibn 'Ashur, and some contemporaries like al-Fasi and al-Raysuni, to name a few.³⁸ The discourse on *maqasid* marks a significant departure from the traditional literal approach to *ijtihad*. This was obtained through a purposive

33 *Ibid.*

34 Habib Ahmed, *The Role of Zakat and Awqaf in Poverty Alleviation*, Jeddah, Islamic Development Bank Group, 2004, Occasional Paper No 8 at p 32.

35 For instance, in the State of Selangor until December 2008, out of 616.5225 acres of registered *waqf* lands, 503.798 acres (75.04%) were allocated for mosques, 0.42% for cemeteries and 6.68% for small mosques. Only 8.20% were allocated for schools and 1.84% for orphanages. See Norhaliza bt Mohd Nor and Mustafa Omar Mohammed, *Categorization of Waqf Lands and their Management Using Islamic Investment Model: The Case of the State of Selangor, Malaysia*, a paper presented in International Conference on Waqf Laws and Management: Realities and Prospects, 20–22 October 2009 at p 5.

36 Surah *al-Jathiyah* (45):18

37 Muhammad al-Zuhayli, *Maqasid al-Shari'ah*, Dar al-Maktabi, Damascus, 1998 at p 8.

I 38 For a chronicle evolution of the theory, see Jassar Auda, 2008, *Maqasid al-Shari'ah as the Philosophy of Islamic Law: A Systems Approach*, London, The International Institute of Islamic Thought, 2008 at pp 1–8.

interpretation of the Shariah rules, by way of *istiqla* (inductive reasoning) in Islamic jurisprudence.

ANATOMY OF MAQASID AL-SHARIAH

Maqasid al-Shariah is a composite of two words: *maqasid* and *al-Shariah*. *Maqasid* is the plural of *maqsad*. Literally, it means intent, objective, purpose, aim and end-goal. Technically, it signifies the stated purposes of the Shariah for the realisation of Allah's servants' interest (*masalih al-ibad*).³⁹ Shariah⁴⁰ signifies the total sum of laws and principles that are ordained by Allah and promulgated through His Prophet to mankind.

Human interests (*masalih*) as the underlying objectives of the Shariah, according to al-Ghazali, have two-faces: *dini*, promotion and preservation of religious values or the human interest in the hereafter and, *dunyawī* or human interest pertaining to this world.⁴¹ These worldly purposes in turn include, the preservation of life, posterity/progeny (*al-nasl aw al-nasab*) or family values,⁴² intellect and wealth. These twofold faces of the objectives of the Shariah ultimately yield five major purposes of the Shariah namely religion, life, progeny, intellect and wealth, which were called by al-Ghazali⁴³ as the five basic principles (*kulliyat al-Khams*).⁴⁴ These five principal human interests at

39 This is a definition by Ahmad al-Raysuni. Al-Fasi defines it as the purpose and secrets that the lawgiver has set for each rule of his laws. For these and other definition by other authorities on *maqasid*, see Nur al-Din ibn Mukhtar al-Khadimi, *Ilm al-Maqasid al-Shari'ah*, Maktabat al-'Abikan, Riyad, 2001 at pp 16-17.

40 This is the definition of the Shariah in true sense which distinguishes it from the term *fiqh*. *Fiqh* signifies the body of deduced substantive laws that represents the human understanding of the divine law (as embodied in the Quran and the Sunnah) as well as the operative rules (based on rational methodologies of *ijtihad*) to regulate human conduct within time and space. See Auda, *Maqasid al-Shari'ah as the Philosophy of Islamic Law: A Systems Approach* at p 2.

41 Imran Ahsan Khan Nyazee, *Theories of Islamic Law*, Islamabad, International Institute of Islamic Thought, 1994 at p 240.

42 As redefined by Nyazee as such. See *ibid*.

43 This is the most popular itemisation of human vital interest as outlined by al-Ghazali and elaborated by al-Shatibi. Nevertheless to other scholars, such as Ahmad al-Khamlishi, al-Qaradawi, al-Raysuni and some other contemporary authorities, such a construction being a result of human *ijtihad* cannot be taken as conclusive (or even exclusive). They expanded its scope to include other vital human interests within its ambit, such as *'ird* (human dignity), justice, equality, freedom, socio-political and economic right of human beings. For details, see Jamal al-Din 'Atiyyah, *Nahw Taf'il Maqasid al-Shari'ah*, Dar al-Fikr, Damascus, 2001 at pp 98-105; Ahmad al-Raysuni, *Nazariyyat al-Maqasid 'ind al-Imam al-Shatibi*, Dar al-Aman, al-Rabat, 1991 at pp 358-359; Auda, *Maqasid al-Shari'ah as the Philosophy of Islamic Law: A Systems Approach* at pp 1-8.

44 Nyazee, *Theories of Islamic Law* at p 240.

A the apex of the objectives intended by God have been complemented by two other levels of interest, known as needs and embellishments.

Accordingly, human interests in order of priority have been classified into the three broad following categories.

B (1) Necessities (*daruriyyat*), consisting of religion, life, progeny, intellect and wealth. They are essential because upon them, the life of men depends upon and if threatened, corruption, disorder and injustice will result in individual and collective life. As al-Shatibi maintains: '*Daruriyyat* are vital because they are indispensable in sustaining the *masalih* (*maslahah*) of *din* and *dunya* (the world), in the sense that if they are disrupted, the stability of the world is disrupted. Their disruption results in the termination of life in the world, and in the hereafter, it results in losing salvation and blessings.'⁴⁵

C (2) Needs (*hajiyyat*) consisting of facilities that human beings need in order to provide them with ease and relief in a situation of hardship and difficulties in life though their non-existence do not disrupt life and give rise to widespread chaos but result in hardship and stress.⁴⁶

D (3) Embellishments (*tahsiniyyat*)⁴⁷ consisting of all things that enhance human mores and manners. Their disruption though is neither disruptive to life nor entails hardship but a people devoid of them will be lowered in the estimation of right thinking and right natured people. *Tahsiniyyat* in this sense denotes the idea of good habits and the Islamic code of morality.⁴⁸ Consequently, the Shariah rules and regulations on the whole provide for practical measures to cater for all three levels of human interests, namely, the vital needs, the complementary needs and the betterment requirement. A day-to-day example that illustrates the existence of this hierarchy of human *maslahah* in the Shariah paradigm is the following:

(a) One of man's vital needs is housing, the existence of windows to allow for ventilation in the house is complementary to it, and to equip the house with facilities, such as furniture and beds are required to enhance the quality of the house.

(b) Analogous situation in the Shariah is the case of necessity of having a *din* (religion) for people. To safeguard this very vital *maslahah* for man, in the case of Muslims, the Shariah puts practical measures by which *din* can be nurtured and enhanced. For instance, it ordains Muslim to uphold the laws

45 al-Shatibi, *al-Muwafaqat fi Usul al-Shari'ah*, Vol 2 at p 8.

46 al-Shatibi, *ibid* at p 10.

47 It is to be noted that *Maqasid al-Shariah* has been variously classified, based on various considerations, and its division into *daruriyyat*, *hajiyyat* and *tahsiniyyat* as we referred here represents the main one denoting the overall objective of the Shariah in taking into account various levels of human needs. For details, see al-Raysuni, *Nazariyyat al-Maqasid 'ind al-Imam al-Shatibi* at p 124; al-Khadimi, *Ilm al-Maqasid al-Shari'ah* at pp 71-75.

48 Muhammad Khalid Masud, *Islamic Legal Philosophy*, Islamabad, International Institute of Islamic Thought, 1994 at pp 241-244.

of obligatory *ibadah* for consolidation of their sense of religious belief. To enable Muslims to perform the *ibadah* at all times, even if they are sick, various facilitating rules, such as praying in a sitting position, and performing *taymmum* when ablution is impossible, are allowed as part of *hajyyat*. To enable Muslims to achieve more excellence in worshipping God, Sunnah prayers are recommended as part of *tahsiniyyat*.

WAQF IN THE FRAMEWORK OF THE MAQASID

Ibn 'Ashur places Islamic endowment under the *hajj* category of the *maqasid*. *Hajyyat* constitutes the purpose behind those provisions of the Shariah which provide ease in case of difficulty and which eliminate or reduce hardship from people's lives. As Ibn 'Ashur defines them 'That which Muslim community needs them for satisfaction of their well beings and managing their affairs in a better way because the non-existence of *hajyyat*, though does not lead to the total disruption of social order, it definitely affects its orderly functioning'.⁴⁹ For example, if a sick person is required to fast in the month of Ramadan, it will be very hard for him or it may even be impossible for him to do so. Therefore, the Shariah affords such a person the option of postponing the days during which he, due to illness, cannot fast.⁵⁰ In business transactions also, the Shariah has allowed a variety of contracts and trading practices on the the doctrine of *umum al-balwa* (inescapable necessity) if an objectionable element in a business otherwise cannot be avoided at all. For instance, a negligible rate of non-*halal* income that an investor gets by way of dividend is tolerated on account of an unavoidable situation.⁵¹ Similarly, in the area of human custom and habit (*adah*), the Shariah allows the incorporation of any local custom into the body of Islamic law in meeting human needs so long as it is not otherwise prohibited. It likewise allows divorce in a case where a marriage conflict becomes intolerable.⁵²

In this context, *waqf*, to Ibn 'Ashur, is one of the major components among the donations (*sadaqat*) whose *raison det're* is to ease the difficulty faced by the destitute and the poor on top of realising other social objectives which need to be taken care of. The reason is that human greed would not have allowed supporting these causes had Islam not sanctioned them by clearly declaring that the merit for such benevolent acts, even after death, does not cease. That is why his great companions such as Umar, Abu Talhah and others like Utham⁵³ took the lead to make *waqf* for public welfare.⁵⁴

49 Muhammad Tahir ibn 'Ashur, *Maqasid al-Shari'ah al-Islamiyyah*, Ed Muhammad El-Tahir al-Mesawie, Kuala Lumpur, Fajar Ulung Sdn Bhd, 1999, (1st Ed) at p 223. See also al-Shatibi, *al-Muwafaqat fi Usul al-Shari'ah*, Vol 2 at p 10.

50 Surah *al-Baqarah* (2):184

51 Islamiqmoney.com.

52 Ibn 'Ashur, *Maqasid al-Shari'ah al-Islamiyyah* at p 11.

53 Uthman bought the Well of Rumah and made it *waqf* under the instruction of the Prophet.

54 Ibn 'Ashur, *Maqasid al-Shari'ah al-Islamiyyah* at pp 302-306.

A Joining Ibn 'Ashur, al-Zarqa held that *waqf* is a method of upholding *al-birr* (righteousness) and caring for the next of kin as well as the poor, and as such, is an integral part of religion as it represents its essence of mutual assistance.⁵⁵

The implications of this theory, for *waqf kahiri* include the following.

B First, *waqf* in the scheme of *maqasid*, being a *hajj* benefit is fundamental in supporting religion, life, family, human intellect and even property at the societal level. The reason is that if *waqf* is not instituted, houses of worship cannot be solely built and sustained on *zakat* fund as it is designated for other social causes besides *fi sabil Allah* (the cause of God). Poverty-stricken people who have no access to education, healthcare, daily means of sustenance would not be expected to be a part of the productive and meaningful citizenry among the *ummah*. This is the logic behind the organic connection behind the hierarchy of *maqasid* as the demand for *daruriyyat* creates the demand for *hajjiyyat* and *tahsiniyyat* and also the principle that *hajjiyyat* and *tahsiniyyat* are pursued for the sake of *daruriyyat*.

D Second, the utility anticipated by *waqf*, namely, the socio-economic welfare of the *ummah* would remedy the deviant economic behavior on the part of some Muslims who spend a bulk of their wealth on *tahsiniyyat* at the expense of *hajjiyyat* which in turn jeopardises the necessities desired by Islam. For instance, optional *hajj* and *umrah* more often by wealthy people who do not care about the plight of the poor and social causes is a case in point. A question is raised here as to which of these voluntary devotions should be given priority, particularly in view of conditions of extreme poverty, hunger and diseases that prevail in many Muslim societies today.

F A cursory study of the issue from Islamic sources would provide us with the answer that charity, which is more socially-oriented than voluntary pilgrimage, should be given priority over it. The reasons are: (1) Muslims cannot remain unconcerned and indifferent to other peoples' misery and suffering based on the authority of the Prophet's tradition where he declared: 'The mutual love, kindness and graciousness of Muslims function like a body; when some of its part are in pain, then all the other parts of the body become a victim of fever and sleeplessness';⁵⁶ (2) the governing law of human relationship, in the Islamic view, is one of sympathy and not antipathy. The Prophet clearly voiced this concern: 'A Muslim is a brother to another Muslim. He shall neither oppress him nor should he usurp his right. He who provides for the needs of his brother, will be helped by God. And for him who removes one difficulty of a Muslim brother, God will remove one difficulty of his on the day of the judgment. And for him who covers the defect of a Muslim brother, then on the day of the judgment, God will cover his defect';⁵⁷ and (3) in the event of a conflict between a

55 Mustafa al-Zarqa', *Ahkam al-Waqf*, Dar 'Ammar, Jordan, 1980 at p 21.

I 56 Fazlul Karim, *Mishkat al-Masabih*, Delhi, Islamic Book Services, 1994, Vol 1 at p 291.

57 *Mishkat al-Masabih*, Vol 1 at p 296.

voluntary worship and social responsibility, the rule is to fulfill the latter. This principle is drawn from the practice of Ibn Abbas.

One day, Ibn Abbas was performing *Itikaf* (spiritual retreat) in the mosque. A man came to him. He saluted him and sat down. Ibn Abbas said to him that he looked worried and inquired what the matter was. The man replied: 'Yes O cousin of God's Prophet! I have to repay someone's debt but I have no means to do so. Ibn Abbas said: 'May I talk to you in this connection? He replied that if he wished to, he might. Ibn Abbas then put on his shoes and came out of the mosque. The man reminded him that he was observing *Itikaf*, which was nullified by the act of going out of the mosque. Ibn Abbas replied: No, I have not forgotten. But I have heard from the Prophet who said: He who walks for the need of his brother and satisfies his need, then his act is better for him than ten years of *Itikaf* and he who performed one day's *Itikaf* for God's pleasure then God will place three trenches between him and hell, and whose distance will be more than the distance between the East and West.'⁵⁸

Hence, the above tradition makes it lucidly clear that spending one's wealth for human welfare is more superior than doing the voluntary pilgrimages over and over again. Consequently, Muslims who perform the *hajj* and *umrah* repeatedly but do not dispense a single penny to help the poor and the needy have certainly lost sight of the essence of worshipping God and the sense of priority and balance in their acts of devotion to Him.

Third, the understanding of this ethical norm would prevent *israf* (prodigality)⁵⁹ and lavish spending (*tabdhir*) among Muslims. A person who lavishly spends on *tasiniyyat*, lets say leisure trips, feasts or wedding parties while the poor and the orphans starve in his backyard is committing the offence of *israf* and *tabdhir* as prohibited by Islam. More serious is when such practices become a social custom and the widening of the *economic* gap between the poor and the needy, leads the latter to be involved in crimes of theft, burglary and other crimes against the wealthy in society. The Prophet anticipated this when he said: 'O Abu Dharr! When you prepare soup put a little more water in it, and see if your neighbour needs some.'⁶⁰

Lastly, the main objective of *waqf* is benevolence (*al-birr*) as held by al-Zarqa. *Al-birr* according to al-Zuhayli is a collective name embracing all donations dedicated to the destitute, scholars, relatives, mosques, schools, hospitals, welfare homes, *hajj*, striving for promotion of Islamic cause and researches and publications of Islamic books. Accordingly, dedication of *waqf* to mosques alone does not take care of other heads of *hajiyyat* for

58 Quoted in Muhammad al-Ghazali, *Muslim Character*, Delhi, Hindustan Publication, 1984 at p 309.

59 M Fahim Khan and Noor Muhammad Ghifari, *Shatibi's Objectives of Shari'ah and Some Implications for Consumer Theory*, in *Readings in Islamic Economic Thought*, Abul Hassan M Sadeq and Aidit Ghazali (Ed) at p 198.

60 Yahya ibn Sharaf al-Nawawi, *Riyad al-Salihin*, Vol 1, Mu'assasat al-Rayyan, Beirut, 1994 at p 192.

- A which *waqf* as one of the measures has been instituted in Islam as maintained by Ibn 'Ashur.

CONCLUSION

- B *Waqf* which involves a process of holding up of the property and devoting its usufruct to the beneficiaries historically was an important source of financing public utilities, education and researches, healthcare and caring centers for the orphans and disabled aside from providing capital for traders and maintaining mosques and providing space for burial of the dead.
- C Nevertheless, the contemporary practice of *waqf* represents a somewhat skewed understanding of *waqf khayri* as it is taken to mean devoting for purely ritualistic causes. This paper, therefore, argued for a paradigm shift on the part of Muslims on the basis of the purpose of the Shariah and *fiqh* of priority. In this context, dedicating one's wealth for the capacity building among the poor and the needy secures life, intellect, creates wealth and increases the number of committed Muslims to uphold religion and go to pray in the mosques, built on *waqf* land. Loss of sensitivity to care for the welfare of such people, on the other hand, increases poverty which in turn plums up the social-ill index.
- D

- E Accordingly, to optimise contribution towards the creation of such a philanthropic *waqf* (public endowment) in the wider sense as was the case during the glorious days of Islam, we propose the following legislative strategies:

- (1) At the epistemological level, the Religious Council of each States in Malaysia must emphasise the role of the welfare type of *waqf* within the frame of other voluntary acts of worship via religious teachers involved in mosque related activities.
- (2) At the juristic level, the idea of cash *waqf* and also temporary *waqf* as reflected by best practices, such as in Kuwait and South Africa should be popularised so as to dispel the notion that *waqf* has to be in the form of real estate or permanent assets.
- (3) Baitulmal in coordination with Tabung Haji and Takaful Malaysia in turn can solicit welfare endowment from those who more often go for voluntary *hajj* and *umrah*.
- (4) Baitulmal in coordination with other family members of the founder and non-profit organisation could encourage creation of income generating endowments where the proceeds could be spent on social welfare. During Uthman Caliphate, cash was invested in *mudarabah* and the revenues generated from them were used for charitable purposes.⁶¹
- (5) Popularise the idea of welfare *waqf* among the employees both in private and public sectors in order to encourage them part with a portion of their salary as tax-deductable *waqf*.

61 Ahmed, *The Role of Zakat and Awwaqaf in Poverty Alleviation* at p 133.